United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 75-4205

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

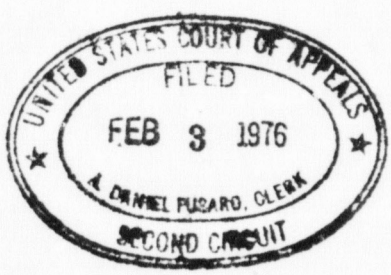
v.

JACK LA LANNE MANAGEMENT CORP.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD



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STATEMENT OF THE ISSUES PRESENTED

I. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(4), (3), and (1) of the Act by reducing the hours of employment of employees Paulette Anderson and Richard Kaufman, by assigning employees Anderson and Debra Caron more arduous duties and eliminating employee Kaufman's calisthenic classes, by directing other employees not to associate with Anderson and Caron, by attempting to require Caron to admit to a fabricated violation of Company rules, and by discharging Anderson, all because they engaged in union activities and gave testimony adverse to the Company at an unfair labor practice hearing.

II. Whether the Board's order is valid and proper.

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order issued against Jack La Lanne Management Corp. (the "Company"), on June 26, 1975. The Board's decision, by Members Jenkins, Penello, and Kennedy, is reported at 218 NLRB No. 134 (A. 52). This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in New York, N.Y.[1]

I. THE BOARD'S FINDINGS OF FACT

A. Introduction

Jack La Lanne Management Corp. (herein the "Company") is a New York Corporation engaged in the operation of ten health spas in and around the City of New York which provide the general public with physical fitness and recreation services (A. 5; 66, 67, 76).[2] The Company sells memberships to its spas which privilege the purchaser to appear at the spa for workouts, individualized instruction, and calisthenic classes (A. 8; 165, 176-176, 183-184, 812-813).

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[1] "A" references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. In addition, several documents lodged with the Court will be described in full.

[2] Two spas are located in Brooklyn (Kings Highway and Flatbush); two more are in Queens (Douglaston and Lefrak City); one is in Nassau County (Woodmere); one in Fort Lee, New Jersey; and four in Manhattan (Executive, Madison, 86th Street and Biltmore) (A. 7).

At all material times, Harry Schwartz was the Company's president (A. 10; 797); his wife Gabrielle Schwartz was female service supervisor (A. 10; 687). Andrew Bostino was the men's service supervisor (A. 34; 782), and Anita Katz served as assistant female service supervisor (A. 10; 545).

The Company employs the service supervisors and assistant service supervisors to help the president manage the employees at the various spas (A. 8; 114, 116-117). In addition, at each spa there is a manager, who is primarily responsible for the promotion of membership sales, and male and female floor managers, who supervise the employees at that spa (A. 114, 117).

The Company also employs full and part-time instructors at each spa whose duties primarily include supervising members engaged in independent exercise, teaching calisthenic classes, showing new and potential members the spa's facilities, and cleaning the spa at the end of each day (A. 8, 15, 18-19; 175-177, 228, 388). The members engaged in individual exercises and the number of calisthenic classes are normally distributed among the available instructors (A. 18; 387, 330). The cleaning work consists of vacuuming the gym and the ballet room, cleaning the mirrors, dusting the chrome and wiping down the leather parts of the equipment, mopping the tiled floor around the gym area, dusting the rollers, and returning the weights to their original position (A. 15-16; 228-235, 301-302, 536). Normally the cleaning work is apportioned among the full and part-time female instructors (A. 16; 302, 328-329, 536), and changed from night to night so that each employee shares in the more difficult tasks (A. 302, 329, 313-314).

B. Background; the Company opposes the Union

The events in question involved primarily the Douglaston spa which also served as the Company's principal office and place of business (A. 7). In early June 1973, Local 966 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America began an organizing campaign among the Company's employees at its various locations (A. 8; 411, 780-781, 114, 115). The Union directed much of its early campaign at the Douglaston spa (A. 8; 215). Among the employees at that spa who signed authorization cards early in the campaign were Paulette Anderson, Richard Kaufman, and Debra Caron (A. 8; 166, 214-215, 317, 410-411).

Debra Caron began working for the Company as a part-time instructor in May 1972 (A. 10; 316). Richard Kaufman was employed by the Company as an instructor since August 1971 (A. 10; 410). He was popular among the members and highly regarded by Company management (A. 32, 35, 38; 415, 424, 426, 717, 815, 825, 100-101). In December 1973, Steve Wolf, assistant floor manager at the Douglaston spa, told Ray Ramos, an incoming floor manager, that Kaufman was one of his best instructors (A. 38; 487, 761, 770-771).[3] Paulette Anderson started working for the Company as a part-time instructor in December 1970 (A. 10; 165). She was also well liked by the members (A. 340, 369, 408, 630), and considered a responsible, co-operative and devoted employee by the Company (A. 23; 617-618, 630). During her employment with the Company she was never reprimanded for lateness or absenteeism (A. 630). In addition

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[3] Frank Bieler was the men's floor manager at Douglaston until replaced by Ray Ramos in February 1974 (A. 731). In March 1974, Steve Wolf, who had been assisting Bieler and Ramos, replaced Ramos as men's floor manager (A. 729-730, 732).

to her duties as an instructor, Anderson was employed as a model by the Company for a series of newspaper advertisements (A. 53; 631, 706).

Employees Kaufman and Anderson took an active part in the Union campaign. Kaufman visited employees at the various spas, and both he and Anderson telephoned employees to solicit support for the Union and to encourage them to vote in the election (A. 166, 216, 219-221).

The Company responded to the Union's organizing efforts by engaging in a campaign of unfair labor practices, which included threatening its employees with a change of working conditions if the Union organizing campaign was successful; interrogating its employees about their Union sentiments; and withdrawing the employees' privilege to use the spas' facilities on their off hours, because of their union activities. Consequently, the Union filed charges with the Board on September 20, 1973 (Case Nos. 29-CA-3437, 3468 and 3538), a complaint issued, and the case was heard by Administrative Law Judge Almira Stevenson on November 5 and 6, 1973, and February 5 and 6, 1974. Employees Anderson, Kaufman, and Caron testified at the hearing on November 5, 1973, on behalf of the General Counsel (A. 10; 167, 317, 418). They testified that, among other things, several members of the Company's supervisory staff threatened to retaliate against them if the Union's organizing campaign was successful (A. 92-96, 102-104). Also present at the hearing when the employees testified were Harry and Gabrielle Schwartz (A. 10; 168, 317). Administrative Law Judge Stevenson's decision in that case issued April 25, 1974, finding that the Company's conduct violated Section 8(a)(1) of the Act. No exceptions were filed to the decision and it was adopted *pro forma* by the Board on June 3, 1974.[4]

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[4] Copies of this decision, referred to herein a "Jack La Lanne I," have been lodged with the Court.

Meanwhile, in June 1973 the Union filed a petition seeking certification as the bargaining representative of the Company's employees (A. 9; 114). A representation hearing was held in July at which employee Kaufman assisted the Union attorney (A. 9; 114, 411). On November 2, 1973, the Board's Regional Director issued a decision directing that an election be held at all ten of the Company's locations (A. 9; 114, 121). The election took place on December 12 and 13 and employees Anderson, Kaufman, and Caron acted as the Union's observers at that time (A. 9; 166, 317, 418). A majority of the employees voted against Union representation (A. 9).

C. The Company continues to infringe upon its employees' rights

In late November or early December 1973, soon after the employees gave their testimony against the Company in the previous unfair labor practice proceeding, Assistant Service Supervisor Anita Katz had a private conversation with instructor Ellen Brezenoff in the Douglaston gym (A. 10, 11; 531-533). Katz warned Brezenoff that Debra Caron and Paulette Anderson "were involved with the Union and had bad attitudes." Katz recommended that Brezenoff keep her record clean and not "involve herself" with Caron and Anderson, and further instructed Brezenoff to keep the other instructresses from associating with them (A. 10-11; 525-526, 532-533).

On December 12, 1973, the first day of the election, Caron telephoned the Douglaston spa pursuant to the Company's Rules and Regulations to report that she would not be at work that day (A. 14; 317-318, 356, 529, 125). After several unsuccessful attempts to speak to Anita

Katz,[5] Caron asked Ellen Brezenoff to inform Katz that she was acting as the Union's observer at the election and would therefore not be at work that evening (A. 14; 317-318, 529). Later that day, Brezenoff told Katz of Caron's call (A. 14; 321, 529). About December 19, Katz called Caron into her office and directed Caron to sign a warning notice. The notice stated that Caron had failed to call in on December 12 to report her intended absence (A. 14; 320-321, 128). Caron told Katz that the warning was not true and refused to sign the notice (A. 14; 321, 128). After Caron left her office, Katz spoke to Ellen Brezenoff and instructed her that if anyone asked about Caron's reporting her absence on December 12, that Brezenoff should answer that Katz was never informed (A. 14; 530). Brezenoff told Katz that she did "not like lying and if it came up in a conversation, [she] would try to avoid it the best [she] could" (A. 530).

Meanwhile, in mid-December, Anita Katz instructed Ellen Brezenoff "to make sure that Debbie Caron and Paulette Anderson were assigned most of the cleaning duties" (A. 16; 527), and the bulk of the members needing individualized instruction (A. 16, 18; 527-528, 639-640). Brezenoff followed these instructions (A. 528, 639-640).

For the next few weeks Anderson and Caron were given more cleaning duties than they had previously received (A. 16-17; 252-253, 301, 536, 387), and were required to supervise a greater number of members engaged in individual exercise (A. 18; 175, 183, 331, 527-528). Thus on December 16, when Anderson returned to work after the election, she was assigned as many as twenty individual members to supervise at one

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[5] In addition to her position of assistant female service supervisor, Anita Katz served as acting female floor manager at the Douglaston spa from the beginning of December 1973 until mid-January 1974, when she appointed Holland to replace her (A. 547).

time, while other female instructors were assigned only two or three (A. 18; 184, 253). Later that day, in variance with the Company's normal procedure, Katz assigned to Anderson virtually all the cleaning duties in the Douglaston gym. Anderson was required to vacuum the ballet room and the main gym area, to remove the exercise equipment from the tiled area adjacent to the gym walls, to mop the area and replace the machinery, and, lastly, to clean the chrome on the equipment (A. 16; 169-172).

In addition, following the election, Anderson and Caron were assigned three or four calisthenic classes per evening while other female instructors conducted only one (A. 18-19; 175, 330, 397). As a result, on some evenings Anderson was required to teach consecutive classes (A. 19; 175). On one such occasion the Company refused instructor Rolinda Antone's offer to teach one of Anderson's classes (A. 19; 386).

None of the other employees were given similarly increased work assignments (A. 20; 301-303; 330-331, 378, 386-388). This pattern continued until late December or early January, when Anderson and Caron complained to Assistant Service Supervisor Katz (A. 15; 185-187). They also reported to Katz that Brezenoff had told them about her being instructed by Katz not to associate with Anderson and Caron, and to pretend that Caron had not called in on December 12 to report her absence (A. 185, 333). Katz responded that Brezenoff had lied to them, that she did not know what they were talking about, and that nothing had changed (A. 15; 185-187, 332-333, 560). After the interview, Katz made no effort to investigate their complaints or to question Brezenoff, who in addition to her normal duties also made work assignments to the other instructors in Katz's absence (A. 609-610). Nevertheless Anderson's and Caron's duties soon returned to normal (A. 15; 187).

The Douglaston spa originally scheduled different hours for male and female members. Thursdays from 10 a.m. to 10 p.m. were for male members. The Company therefore employed only one female instructor for Thursday afternoons (A. 8; 572-573, 615, Respondent Exhibit 9. Copies of R. Exh. 9 have been lodged with the Court.) In August 1973, at the request of Gabrielle Schwartz, Paulette Anderson began working Thursday from 1 to 6 p.m. (A. 20; 189).[6] She continued to work these hours until early January 1974 when Supervisor Katz informed her that she would no longer work on Thursday (A. 20; 187-188, 189, R. Exh. 9). Anderson asked Katz if there were any other hours she could work to maintain her total number of hours per week and Katz said no (A. 20, 23; 188, 256). Consequently, on January 11, Jacqueline Balalos, a newly hired full-time instructor, began working Thursday afternoon (A. 22; 365, R. Exh. 9).

Jean Murphy and Jacqueline Balalos began working for the Company January 2, 1974 as full-time instructors at the Douglaston spa (A. 11; 364-365, 499, R. Exh. 9). Approximately two weeks later, in mid-January, Supervisor Katz called the Douglaston employees to a meeting (A. 11; 366, 376, 501, 508, 677). Among those present were employees Balalos, Murphy, Antone, Dee Arnot and Joan Holland (A. 366, 501). At the meeting Katz announced the appointment of Joan Holland as floor manager and Dee Arnot as assistant floor manager (A. 11; 366, 501, 840). Within the next few days, Holland and Arnot began to wear badges designating them as floor manager and assistant floor manager respectively, and began to assume the duties of their new positions (A. 13; 368, 377). Holland began making work assignments, scheduling hours and rest periods

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[6] During this period Anderson was also working Monday 5 to 9 p.m., Wednesday 6 to 9 p.m., and on Sunday 1 to 5 p.m. (A. 20, 187, 228).

and preparing payroll records (A. 13; 368, 502-503). About January 23, employee Antone submitted to Holland a written request for a change of hours. Holland accepted the request and signed it, "Joan Holland, floor manager" (A. 13; 652-653, 99). Later that month, Holland and Arnot met privately with employees Balalos and Murphy (A. 11; 367, 501-502). Holland advised Balalos and Murphy that Anderson and Caron were "big supporters of the Union and not good for the Company." Holland further stated that the Company was doing all it could to get rid of Anderson and Caron and recommended that Balalos and Murphy not be too friendly with them (A. 11; 367-368, 502, 508-509).

Prior to the commencement of the Union's organizational campaign, Richard Kaufman was working 25 hours and teaching seven calisthenic classes per week (A. 31, 33; 412, 413, Respondent Exh. 14. Copies of R. Exh. 14 have been lodged with the Court). The Company was aware that Kaufman enjoyed teaching calisthenics classes and that the spa's members enjoyed attending them (A. 33, 34; 414-416, 726). Service Supervisor Joseph Bostino was so impressed with Kaufman's teaching of the calisthenic classes that in June 1973 he wanted to transfer Kaufman to Lefrak City in order to increase that spa's membership (A. 34; 478, 792). However, in July 1973, after the beginning of the Union campaign, three of Kaufman's classes were transferred to female instructors (A. 34; 417). During the week of October 19, 1973, his hours were reduced from 25 to 20-1/2 per week (A. 31; 413, R. Exh. 14). During the week of February 15, 1974, his scheduled hours were reduced from 20-1/2 to 16-1/2 and one week later were again reduced from 16-1/2 to 9-1/2 hours per week (A. 31; 423, 427, R. Exh. 14). While Kaufman's hours were drastically decreased, the hours of the full-time instructors remained essentially unchanged and the hours of two new part-time instructors gradually increased and continued to rise in March even though Kaufman's remained the same (A.

56; 427, 473-474, 483, R. Exh. 14). During February and the beginning of March 1974, all of Kaufman's calisthenic classes were re-assigned to floor manager Ray Ramos (A. 34; 419-420). One evening late in February, the newly scheduled instructor was absent and only Kaufman was available to teach the class. The Company did not ask Kaufman to take the class, and arranged for an employee to commute from Lefrak City (A. 34-35; 422). Shortly thereafter, when the Douglaston spa was again without its scheduled calisthenics instructor, Kaufman was assigned to teach the class but only after all the other instructors refused (A. 35; 422-423). John Wilton, manager of the Douglaston spa, approached Kaufman later that evening and said: "[P]lease, whatever you do, don't give any classes when I'm here because I don't want to lose my job." Wilton had been instructed by Service Supervisor Andrew Bostino not to allow Kaufman to teach any calisthenic classes (A. 35; 423, 479-480, 716-717, 725).[7]

Sometime after the elimination of Kaufman's calisthenics classes, Company President Schwartz learned that members of the spa were circulating a petition seeking reinstatement of Kaufman's classes (A. 35; 425, 807-808). Schwartz instructed Kaufman to tell any member who inquired that he was no longer giving the classes because he was needed in the gym. Schwartz also stated that he might never forget what had happened the previous year, but if Kaufman did his job he did not have to worry. Schwartz further said that he and Gabrielle Schwartz were "disappointed" with Anderson and Kaufman for testifying at the previous unfair labor practice hearing (A. 35-36; 425-426, 808-809).

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[7] John Wilton was replaced as manager of the Douglaston spa by Dennis Karpf in June 1974 (A. 32; 773-774).

About June 18, 1974, shortly after becoming manager of the Douglaston spa, Dennis Karpf met with Kaufman in the gym (A. 32; 427, 774). Karpf told Kaufman that he thought Kaufman was a great instructor and looked forward to working with him (A. 32; 427, 774). Later that evening, Karpf asked Kaufman what the Company had done to him besides cutting his hours and whether the Company had been harassing him "since the Union business." Kaufman replied that the Company had cut his hours and eliminated his calisthenic classes (A. 32; 427). A few days later Karpf approached Kaufman and said, "Let's forget about this Union vendetta. . . . From now on, if we need you in an emergency situation, we'll give you more hours." Karpf added that if President Schwartz found out, either Karpf or another supervisor, with whom he had cleared it, would take the responsibility (A. 32; 428, 433). After their conversation, Kaufman occasionally worked additional hours (A. 32; Tr. 434-437, 744-745).

D. The Company discharges Anderson

Early in February a personnel shortage arose at the Company's Woodmere, Long Island spa (A. 26; 580). In order to fill that need, Supervisor Anita Katz called several Douglaston instructors including Rolinda Antone, Debra Caron, and Paulette Anderson and asked them to transfer temporarily to Woodmere (A. 26; 189, 337, 356, 580-581). Antone refused because she was unable to retain a sitter for her baby (A. 26; 580). Caron refused explaining that she had no means of transportation (A. 26; 337, 580-581). Anderson was at that time using a car borrowed from a friend to commute to work and told Katz that she would go to Woodmere if she could obtain enough gasoline (A. 26; 190-191). Anderson was able to secure fuel, and for the next three weeks commuted to Woodmere (A. 26; 191-193, 260).

In March the Company was suffering a shortage of personnel at its Madison spa (A. 28; 581). Consequently, about March 12, Katz called Rolinda Antone and Debra Caron and told them that she needed someone to work at the Madison or Lefrak spa (A. 26; 337-338, 389, 582).[8] Antone and Caron both refused. Antone explained that she would need a babysitter and had problems with transportation (A. 26; 388-389). Caron told Katz that it was not worth traveling by train to Manhattan for her few hours of work and that she had no car to commute to Lefrak City (A. 26; 338). Katz then called Anderson. She told Anderson that she was giving Anderson the "first crack at a new job opportunity since she had the most seniority" and asked her to work at the Madison spa (A. 27; 198, 262). Anderson replied that it was not possible as she no longer had a car of her own and added that her brother was currently driving her to and from work at Douglaston (A. 27; 198). Katz then suggested the subway but Anderson explained that such a commute to Madison would require her traveling late at night through dangerous neighborhoods and that she was afraid to take that risk (A. 27; 199, 262). When Katz pressed further, Anderson said that, since she had just returned from Woodmere, it would be more equitable to send another instructor (A. 27; 199, 263). Katz then asked Anderson if she would go instead to Lefrak City. Anderson repeated that her brother was her only means to get to work, but offered to help out as soon as she was able to get a new car (A. 28; 200-201).

About a week later, Katz called Antone again and Antone agreed to work temporarily at the Lefrak spa (A. 28; 389). After working in Lefrak one day, Antone decided that she did not like the parking arrangements

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[8] Katz reasoned that if she could get someone from Douglaston to commute to Lefrak, she could send an instructor from Lefrak to Madison (A. 582).

and told Katz that she could no longer work there and returned to work at Douglaston (A. 389, 628, 635).

The Company's staffing problems at Madison did not ease and about March 22 Katz called Antone and Caron who again refused for the same reasons (A. 28; 585-586, 623-624). Katz then called Anderson and told her that she had to transfer to Madison (A. 28; 201, 265, 266). Anderson reminded Katz that she was afraid to travel on the subway late at night (A. 28; 201). Anderson further informed Katz that Anderson's cousin had recently been molested and assaulted on the subway near their home in the Bronx and added that she "didn't think a part-time job for the number of hours [she] was getting was worth risking [her] life" (A. 28-29; 201, 267). Katz replied that if Anderson could not help the Company, she was not needed as an employee (A. 29; 201). Anderson responded that she did not understand Katz's position. She reminded Katz that she had worked for the Company three and a half-years, that she was their most senior employee, that she had only recently borrowed a friend's car and commuted to Woodmere for three weeks for the Company and reiterated that her only reason for not wanting to go was her personal safety (A. 29; 201-202, 267). On March 24, Katz called Anderson again and gave Anderson the choice of transferring to Madison or being given a leave of absence (A. 29; 203-204). When Anderson told her that it was an unreasonable request, Katz insisted that by her refusal Anderson was either quitting or she would have to take an involuntary leave of absence. Anderson denied she was doing either and told Katz that either the Company was firing her or she was still its employee (A. 29-30; 204).

Later that day when Anderson was at work at Douglaston, Katz informed her that as of the next day Anderson would "not [be] needed with the Company." When Anderson asked if she was being fired, as she

was not quitting or asking for a leave of absence, Katz repeated only that she would not be with the Company (A. 30; 204-205).

On March 25, Anderson reported to work at the Douglaston spa (A. 30; 205, 827-828, 831). She was called into Manager Wilton's office, where Wilton told Anderson that he had been instructed to fire her (A. 30; 206-207, 703-705, 707, 830). Wilton then signed a paper Anderson had prepared acknowledging that he was terminating her employment (A. 30; 207, 664, 714, 830).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board concluded that the Company violated Sections 8(a)(4), (3) and (1) of the Act by instructing employees not to associate with Anderson and Caron, by attempting to require Caron to admit to a fabricated violation of Company rules, by assigning Anderson and Caron more arduous duties, by eliminating Kaufman's calisthenics classes, by decreasing the hours of employment of Anderson and Kaufman, and by discharging Anderson (A. 38-39, 45-46).

To remedy these violations, the Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 activities (A. 46-47). Affirmatively, the Board's order requires the Company to offer Anderson reinstatement with backpay, to make whole Anderson and Kaufman for any loss of earnings incurred as a result of the reduction of their hours, to make available to the Board relevant Company records for the determination of the amount of backpay, and to post the usual notices (A. 48).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY'S VIOLATED SECTIONS 8(a)(4), (3) AND (1) OF THE ACT BY ATTEMPTING TO ISOLATE EMPLOYEES PAULETTE ANDERSON AND DEBRA CARON, IMPOSING MORE ONEROUS CONDITIONS OF EMPLOYMENT ON EMPLOYEES ANDERSON, CARON AND RICHARD KAUFMAN, DECREASING THE HOURS OF ANDERSON AND KAUFMAN, DISCIPLINING CARON AND DISCHARGING ANDERSON BECAUSE THE EMPLOYEES TESTIFIED AGAINST THE COMPANY IN A PRIOR UNFAIR LABOR PRACTICE HEARING AND ENGAGED IN UNION ACTIVITIES

Section 8(a)(4) of the Act makes it an unfair labor practice for an employer to take reprisals against an employee for giving testimony under the Act. *N.L.R.B. v. Scrivener,* 405 U.S. 117, 121-125 (1972); *N.L.R.B. v. J.P. Stevens and Co.,* 464 F.2d 1326, 1348 (C.A. 2, 1972), cert. denied, 410 U.S. 926; *N.L.R.B. v. V. & H. Industries, Inc.,* 433 F.2d 9, 10 (C.A. 2, 1970). And Section 8(a)(3) of the Act prohibits an employer from discriminatorily discouraging employee union membership or activity.

Thus, if an employer discharges an employee,[9] changes his terms and conditions of employment[10] or disciplines an employee,[11] the employer's

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[9] *Discharge for giving testimony under the Act: N.L.R.B. v. Scrivener, supra; N.L.R.B. v. J.P. Stevens and Co., supra; N.L.R.B. v. Customer Control,* 309 F.2d 150 (C.A. 2, 1962).

Discharge for union activity: N.L.R.B. v. J.P. Stevens and Co., supra; N.L.R.B. v. Milco, Inc., 388 F.2d 133, 138 (C.A. 2, 1968); *N.L.R.B. v. Advanced Business Forms Corp.,* 474 F.2d 457, 464 (C.A. 2, 1973).

[10] *Change in conditions of employment for giving testimony under the Act: N.L.R.B. v. J.P. Stevens and Co., supra; N.L.R.B., v. King Louie Bowling Corporation of Missouri,* 472 F.2d 1192 (C.A. 8, 1973); *Sheboygan Sausage Co.,* 156 NLRB 1490, 1513-1516 (1966).

Change in conditions of employment for union activity: N.L.R.B. v. Lowell Sun Publishing Co., 320 F.2d 835, 840 (C.A. 1, 1963); *N.L.R.B. v. A & S Electronic Die Corp.,* 423 F.2d 218, 222 (C.A. 2, 1970), cert. denied, 400 U.S. 833; *Retail Store Employees Union Local 880, RCIA v. N.L.R.B.,* 419 F.2d 329, 333 (C.A.D.C., 1969).

[Footnote 11 appears on page 17] (continued)

conduct will violate Section 8(a)(4) if he is acting in retaliation for the employee's testifying at a Board hearing and will violate Section 8(a)(3) and (1) if also motivated by anti-union animus.

In the instant case, the Board found that the Company's motives in changing the conditions of employment of employees Anderson, Caron, and Kaufman, reprimanding Caron and discharging Anderson were ones prohibited by Section 8(a)(4) and (3) of the Act. It is well settled that the ascertainment of an employer's motivation is within the province of the Board whose determination "cannot lightly be overturned" upon judicial review. *United Aircraft Corp. v. N.L.R.B.*, 440 F.2d 85, 91 (C.A. 2, 1971). In particular, a court "may not displace the Board's choice between two fairly conflicting views even though the Court would justifiably have made a different choice had the matter been before it *de novo.*" *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 405 (1962). It is also well recognized that the Board's conclusions relative to discrimination must often depend on circumstantial rather than direct evidence. As this Court has noted, "evidence of [motive] may consist both of direct testimony by the one whose motive is in question and inferences of probability drawn from the totality of other facts." *N.L.R.B. v. Park Edge Sheridan Meat, Inc.*, 341 F.2d 725, 728 (C.A. 2, 1965); *N.L.R.B. v. Dorn's Transportation Co.*, 405 F.2d 706, 713 (C.A. 2, 1969). Moreover, "the

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[11] *Disciplining an employee for giving testimony under the Act: N.L.R.B. v. Lifetime Door Co.*, 390 F.2d 272, 276 (C.A. 4, 1968); *Block Southland Sportswear, Inc.*, 170 NLRB 936, 974-977 (1968).

Disciplining an employee for union activity: Robertshaw Controls Co. v. N.L.R.B., 483 F.2d 762, 765-766 (C.A. 4, 1973); *N.L.R.B. v. Texas Industries, Inc.*, 426 F.2d 812, 813 (C.A. 5, 1970); *N.L.R.B. v. Bin-Dicator Company*, 356 F.2d 210, 214-215 (C.A. 6, 1966); *N.L.R.B. v. General Industries Electronics Co.*, 401 F.2d 297, 300 (C.A. 8, 1968).

existence of a valid ground for discharge is not sufficient . . . if it was merely a pretext or if the discharge was based, in part, on an unlawful ground." *N.L.R.B. v. Advanced Business Forms Corporation*, 474 F.2d 457, 464 (C.A. 2, 1973). Accord: *N.L.R.B. v. George J. Roberts & Sons, Inc.*, 451 F.2d 941, 945 (C.A. 2, 1971).

Furthermore, the conduct at issue may properly be viewed against the background of the Company's aversion to having its employees represented by a union. Thus, in *Jack La Lanne I* the Company was found by the Board to have violated Section 8(a)(1) of the Act by threatening reprisals, engaging in interrogations of its employees' union sentiments and other unfair practices designed to thwart its employees' union organizing activities. The Company's previous resort to unlawful measures in an effort to impose its own desires on the employees is, of course, significant in weighing its motives here. *N.L.R.B. v. Stowe Spinning Co.*, 336 U.S. 226, 231 (1949); *Textile Workers Union of America v. N.L.R.B.*, 388 F.2d 896, 898 (C.A. 2, 1967), cert. denied, 393 U.S. 836; *N.L.R.B. v. Murray-Ohio Mfg.*, 326 F.2d 509, 511 (C.A. 6, 1964); *N.L.R.B. v. Stafford Trucking, Inc.*, 371 F.2d 244, 246-247 (C.A. 7, 1966). This is especially true since the prior discrimination involved the same Union organizing campaign and included threats of the very types of reprisals the Board found to be unlawful in the instant case. We show below that the Board's findings, that the Company changed the conditions of employment of employees Anderson, Kaufman, and Caron, disciplined Caron, and discharged Anderson because of their testimony against the Company at the Board's unfair labor practice hearing in *Jack La Lanne I* and because of their union activities, are amply supported and thus entitled to acceptance.

As shown in the Statement, it is clear that the Company was well aware of Anderson, Kaufman, and Caron's union activities and Board testimony. In their efforts to solicit employee support for the Union,

Anderson and Kaufman telephoned many Company employees and Kaufman visited several of the Company's spas. Kaufman attended and assisted the Union's attorney at the July 1973 representation hearing. In addition, all three served as the Union's observers at the December representation election. Company President Schwartz and his wife Gabrielle, the Company's female service supervisor, were present at the November 5, 1973, Board unfair labor practice hearing in *Jack La Lanne I* when Anderson, Caron, and Kaufman testified against the Company. Around the end of that month, Assistant Service Supervisor Anita Katz told employee Ellen Brezenoff that she knew that employees Anderson and Caron were involved with the Union. Dennis Karpf, manager of the Douglaston spa beginning June 1974, testified that it was common knowledge throughout the Company's spas that Kaufman was soliciting employee support and "trying to organize a union" (A. 780-781).

Almost immediately following the Board hearing in *Jack La Lanne I* in November 1973, the Company began a campaign of harassment against employees Anderson, Kaufman, and Caron. Thus in late November or early December, Supervisor Anita Katz[12] told employee Ellen Brezenoff that Anderson and Caron "were involved with the Union and had bad

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[12] It was stipulated by Counsel for the General Counsel and the Company during the hearing in the instant case that the following were supervisory personnel at all material times herein: Harry Schwartz (Company president), Gabrielle Schwartz (female service supervisor), Anita Katz (assistant female service supervisor, also acting female Douglaston floor manager December 1973 - January 1974), Andrew Bostino (men's service supervisor), John Wilton (Douglaston manager December 1973 - June 1974), Dennis Karpf (Douglaston manager beginning June 1974), Steven Wolf (Douglaston men's floor manager beginning March 1974, previously assistant floor manager), Ray Ramos (Douglaston men's floor manager February 1974 - March 1974)(A. 521).

attitudes" and advised Brezenoff not to "involve" herself with them.[13] In January, these warnings were repeated by Supervisor Holland.[14] In a private discussion among Holland, Assistant Floor Manager Arnot and employees Balalos and Murphy, the employees were warned by Holland to avoid Anderson and Caron and not be too friendly with them, because they were "big supporters of the Union and not good for the Company" (*supra*, pp. 6, 10).

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[13] The Board's findings in this regard were based on the testimony of the General Counsel's witnesses. And, as frequently occurs, such testimony revealing the Company's unfair labor practices was contradicted by the Company's witnesses in their testimony. The Administrative Law Judge, who saw and heard the witnesses, resolved these credibility disputes in favor of the General Counsel's witnesses. To varying degrees, the remaining findings, discussed *infra*, are based upon credibility determinations. As this Court has repeatedly observed: "questions of credibility are for the [Administrative Law Judge] and the Board." *N.L.R.B. v. L.E. Farrell Co.*, 360 F.2d 205, 207 (C.A. 2, 1966); Accord: *N.L.R.B. v. A and S Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

[14] The Board properly found Floor Manager Holland to be a supervisor within the meaning of Section 2(11) of the Act at the time of her January warning to Balalos and Murphy. Thus, as noted *supra*, n. 12, the Company has conceded the supervisory status of several other floor managers. In the Board's Decision and Order directing the Company's representation election, the Company's floor managers were found to be supervisors and therefore were excluded from voting in the December election (A. 114). Moreover, the Company does not deny that its floor managers carry supervisory authority, but contends only that Holland first became a floor manager in February 1974, and thus was not yet a supervisor at the time of her warning to Balalos and Murphy. The credited testimony of employees Balalos, Murphy and Antone support the Board's finding that Holland's promotion to floor manager was announced at a staff meeting in mid-January and that immediately thereafter, Holland began acting in the capacity of floor manager by assigning duties, setting up work schedules and preparing payroll records. In addition, when Antone submitted to Holland a written request for a change in hours on January 23, Holland accepted the request and signed the slip, "Joan Holland, floor manager." Lastly, a few days after Katz's mid-January announcement, Holland was given a badge as floor manager and was wearing this badge at the time of the warning to Balalos and Murphy (*supra*, pp. 9-10).

Meanwhile, about December 19, 1973, Supervisor Katz gave employee Debra Caron a written warning for an alleged infraction of a Company rule when Katz was fully aware at the time that the rule had actually been substantially complied with. Thus, the evidence clearly establishes that on December 12, 1973, Caron telephoned the Douglaston spa and reported to Brezenoff that she intended to be absent that day because she was acting as Union's observer at the representation election. Yet a few days later, Katz called Caron into her office and directed Caron to sign a written warning notice to the effect that Caron had failed to call in on December 12 to report that she would not be at work.[15] Caron told Katz that the warning was not true and refused to sign the slip (*supra*, pp. 6-7). Immediately after her confrontation with Caron, Katz called Brezenoff into her office and ordered her to lie to anyone who inquired and to pretend she had never told Katz of Caron's December 12 call (*supra*, p. 7).

Shortly thereafter, in late December, Supervisor Katz and Ellen Brezenoff, at Katz's instructions, began assigning employees Anderson and Caron virtually all the daily cleaning duties at the Douglaston spa.[16] Thus,

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[15] The employees Rules and Regulations (R. Exh. 8) require instructors to notify the spas' floor manager if they are going to be absent on a scheduled work day. However, Caron tried several times to speak to Anita Katz, who was at that time acting as a Douglaston floor manager, but Katz was unavailable, and in fact, Katz did receive Caron's message indirectly from Brezenoff that same day. Moreover, the evidence fails to show that the requirement of speaking directly to the floor manager was strictly enforced.

[16] The Company is clearly responsible for the assignment of extraordinary work by Ellen Brezenoff to Anderson and Caron since Brezenoff was acting on behalf of the Company at the order of Assistant Service Supervisor Katz. *N.L.R.B. v. City Transportation Co.*, 303 F.2d 299 (C.A. 5, 1962), cert. denied, 371 U.S. 920.

about December 16, 1974, Katz required Anderson to vacuum the gym and ballet room, move and clean behind the heavy exercise machinery and clean all the chrome on the machinery. At that time, Anderson's and Caron's calisthenics classes were also increased. This resulted in Anderson's having to teach consecutive classes, a duty which Supervisor Katz conceded in her testimony to be arduous (A. 652c). In contrast, the record reveals that the other employees' duties did not increase at that time and, in fact, were substantially less than Anderson's and Caron's. When on one occasion instructor Antone offered to relieve Anderson of one of her calisthenics classes, she was denied permission to do so. At the same time there began to be a disparity in the assignment of Anderson and Caron to supervision of individual members' calisthenics exercise. Previously the available instructors shared in the numbers of members they were assigned. In late December and early January, however, Anderson and Caron were assigned a disproportionately greater share. When Anderson and Caron complained to Katz about their being assigned more work than the other instructors, Katz denied any responsibility and refused to investigate their complaints. However, Anderson and Caron's grievance brought results and by the end of January, their assignments returned to normal. In addition to changing Anderson's work assignments the Company decreased her hours in early January by approximately one third. Supervisor Katz reassigned Anderson's Thursday afternoon hours to Jacqueline Balalos, a new full-time instructor, and refused Anderson's request for assignment of enough other hours of employment to maintain her current income (*supra*, pp. 7-9).

During the next month the Company's campaign of retaliation turned against employee Kaufman. His weekly hours were reduced gradually from 20-1/2 to 9-1/2 and all of his calisthenics classes were reassigned to another instructor. As the record shows, while Kaufman's hours were

drastically reduced, the hours of all the full-time instructors remained stable and the hours of two new part-time employees continued to rise in March, even though Kaufman's remained the same. In addition, the Company's management was well aware that Kaufman greatly enjoyed teaching calisthenics classes and that the members enjoyed attending his classes. In fact, the Company management was so impressed with Kaufman's performance that Service Supervisor Andrew Bostino wanted to transfer Kaufman to the Lefrak spa to increase its membership. But despite its high evaluation of Kaufman's teaching, the Company abruptly reassigned all his classes in February and early March 1974 to Ray Ramos, the new men's floor manager. Thereafter, when the scheduled instructor for these classes was absent, the Company paid an employee to commute from the Lefrak spa to Douglaston rather than allow Kaufman to teach the class. On other occasions Kaufman was permitted to teach the class but was told by Manager Karpf in the presence of several other employees not to give any further classes while he, Karpf, was in the gym, because he did not want to lose his job (*supra*, pp. 10-11).

Lastly, as shown, *supra*, pp. 6-10, 12-15, Anderson had incurred the animus of the Company by engaging in union activities and by testifying against the Company before the Board. And, as Floor Manager Holland told employees Balalos and Murphy in January of 1974, the Company was doing all it could to get Anderson to leave. The Company tried to isolate her, disparately decreased her hours and increased her duties. When these measures failed to cause Anderson to quit, the Company insisted that she transfer to the Madison spa on penalty of discharge. Antone and Caron similarly refused, but were given no ultimatum. Katz admitted that Anderson was a responsible and co-operative employee, was devoted to the Company and had never been disciplined for absenteeism or lateness or had any other problem that would have contributed to her discharge.

Anderson's only reason for refusing to transfer to Madison – her quite justified fear of traveling late at night by subway through dangerous neighborhoods – is at least as reasonable as Antone's refusal to continue at Lefrak because she did not like the parking arrangements. Nonetheless, the Company discharged Anderson but took no action against Antone.

These facts strongly point to the employees' prior hostile Board testimony and to their protected union activities as at least a reason – if not the sole reason – for the Company's conduct. Certainly the Board is entitled to take the Company at its word when its representatives tell its employees that its actions are motivated by anti-union animus and resentment against previous Board testimony. *N.L.R.B. v. Revere Metal Art Co., Inc.*, 287 F.2d 632, 633 (C.A. 2, 1961); *N.L.R.B. v. F. Bennet Manufacturing Co.*, 291 F.2d 215, 216 (C.A. 2, 1961); *N.L.R.B. v. Treasure Lake, Inc.*, 453 F.2d 202, 203-204 (C.A. 3, 1971); *Chef Nathan Sez Eat Here*, 181 NLRB 159 (1970), enforced, 434 F.2d 126 (C.A. 3, 1970). Indeed, "the Courts pay special attention to such statements against interest when in the unusual case it occurs that a party admits that his conduct, otherwise ambiguous, is for improper purpose or objective." *Brown Transport Corp. v. N.L.R.B.*, 334 F.2d 30, 38 (C.A. 5, 1964). The statements of several of the Company's supervisory personnel based upon the credited testimony of the General Counsel's witnesses amount to "an outright confession of unlawful discrimination." *N.L.R.B. v. Ferguson*, 257 F.2d 88, 92 (C.A. 5, 1958). Thus, when the employees were instructed to stay away from Anderson and Caron, they were told by Supervisors Katz and Holland that this was because of Anderson's and Caron's union sympathies and support. As to the Company's disparate and discriminatory changes in Anderson's and Caron's employment conditions, Supervisor Holland told Balalos and Murphy that the Company was trying every way possible to get Anderson and Caron to leave the Company. Further, in

March 1974, Company President Schwartz told Kaufman that he had not forgotten the employees' union activities of the previous year and that both he and his wife Gabrielle were still "disappointed" with Anderson and Kaufman for their testifying against the Company in *Jack La Lanne I.* Considering these statements together with the Company's previous unfair labor practices and the timing of its present actions, just after the bitter election campaign, we submit that the Board was fully warranted in concluding, as it did, that the Company's motives – at least in part – were unlawful ones.

The Board's conclusion is bolstered by the insubstantiality of the explanations offered by the Company for its actions. Thus, the Company contended before the Board that its January decision to reassign Anderson's Thursday hours was motivated solely by its conclusion that a full-time instructor would be better for Thursdays than a part-time employee such as Anderson. The Company's explanation was properly rejected by the Board. Supervisor Katz explained that the Company believed a full-time employee would be more devoted and better able to work without supervision (as no female floor manager was present on Thursday) and perform the necessary sales duties. However, Anderson was the most senior instructor employed at the Douglaston spa; and, as noted *supra,* she was viewed by the Company as a "responsible," "devoted" employee who "did her job well." Moreover, Anderson had been working as part-time instructor without supervision on Thursdays for almost six months; the record is devoid of evidence that Anderson's performance of her Thursday duties had been less than satisfactory and the Company replaced her with a new employee who had a total of two days' experience (See R. Exh. 9 for weeks ending January 4 and January 11, 1974. Copies of R. Exh. 9 have been lodged with the Court).

The Company's alleged lawful reasons for its reduction of Kaufman's hours and reassignment of his calisthenics classes are also clearly pretextual. Before the Board, the Company claimed that in February the Douglaston spa became overstaffed and that in order to maintain employee Tausek's full-time schedule, the Company decided to decrease the hours of part-time employee Kaufman. However, as shown in the Statement, *supra*, pp. 10-11, there was no broad reduction of instructors' hours during that month and further, while Kaufman's hours were cut from 20-1/2 to 9-1/2, the hours of two new part-time employees were increased. Supervisor Wolf added that another reason for taking away hours from Kaufman was that he was not "performing properly." In fact, other than Wolf's statements, the record contains no evidence that Kaufman's performance at that time was less than satisfactory. Wolf admitted that there were several supervisors including himself regularly on duty during Kaufman's hours and that although the derelictions of duty he attributed to Kaufman should have been obvious, not one supervisor including himself issued Kaufman a warning after January 1, 1974. Indeed, at about the same time that Kaufman's hours were reduced, Wolf admittedly told incoming Floor Manager Ramos that Kaufman was one of Wolf's best instructors (*supra*, p. 4). The statements of Manager Karpf after Kaufman's reduction of hours further buttresses the inference of discriminatory motivation. Thus, in June, 1974, after Karpf replaced Wilton as the Manager of the Douglaston spa he approached Kaufman and asked if the Company had been harassing him "since the Union business" and if he had suffered anything other than reduction of hours. Two days later, Karpf suggested to Kaufman that they "forget about this Union vendetta. . . . From now on if we need you in an emergency situation we'll give you more hours" (*supra*, p. 12). As to the Company's reassignment of Kaufman's remaining calisthenic classes that same month, Company President Schwartz testified that he had decided that it was unwise to have to depend on one man to teach

the classes (A. 787-788). This explanation is unconvincing. President Schwartz' explanation, if credited, would support only a reduction and not a total reassignment of Kaufman's classes. In any event, there were already several other employees teaching calisthenics as a result of the reassignment of three of Kaufman's classes in July 1973. In addition, when Schwartz learned that the members of the Douglaston spa were disturbed that Kaufman would no longer be teaching their classes, Schwartz told Kaufman to give the members an entirely different explanation – that he was unavailable because he was needed in the gym. This explanation is also unsupported by the record. Indeed, as noted *supra*, p. 11, on one occasion after Kaufman's classes were reassigned, the scheduled instructor was absent and Kaufman was the only Douglaston employee able to teach the class, yet the Company resorted to sending for a replacement from Lefrak rather than permit Kaufman to teach it.

In sum, all of the foregoing circumstances – the Company's history of opposition to employee support of the Union as reflected in the Board's findings and conclusions in *Jack La Lanne I;* the individual personal statements of resentment by Company management against Anderson, Kaufman, and Caron for their Board testimony and Union activities; and the transparency of the Company's fabrication of Caron's misconduct combined with the other implausible explanations proffered by the Company – provide ample support for the Board's conclusion that the Company was "engaged in a campaign of retaliation against Anderson, Caron and Kaufman because of their union activities and because they had testified against [the Company] in . . . the prior proceedings." (A. 38-39). Accordingly, the Board properly found that the Company's attempts to isolate Anderson and Caron, the changes in the hours and other conditions of employment of Anderson, Kaufman and Caron, the reprimand of Caron and discharge of Anderson violated Section 8(a)(4), (3) and (1) of the Act (A. 38-39).

Finally, there is no basis for the Company's contention that the charge herein is not broad enough to support the allegations of the Complaint or the Board's findings of violation. Thus, the Administrative Law Judge allowed the General Counsel to amend his complaint early in the hearing to add to the charges the allegation of Joan Holland's supervisory status, Anita Katz's and Joan Holland's instruction to employees not to associate with Anderson and Caron, and Katz's attempt to force Caron to admit to a fabricated infraction of Company rules (A. 158, 162, 179, 181). Before the Board, the Company argued that the allegations in the complaint as amended, pertaining to Kaufman (assigning Kaufman less agreeable tasks and providing Kaufman with less employment) and the allegations added by the amendment exceeded the scope of the allegations contained in the initial unfair labor practice charge. This contention is without merit. As the Supreme Court held in *N.L.R.B. v. Fant Milling Co.*, 360 U.S. 301, 307-308 (1959):

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *N.L.R.B. v. I. & M. Electric Co.*, 318 U.S. 9, 18. The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act . . . .
>
> Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.

The Courts have therefore given the Board considerable leeway to found a complaint on events other than those specifically set forth in the charge. *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 491 (C.A. 2, 1952); *N.L.R.B. v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941, 947-948 (C.A. 1, 1961); *Texas Industries, Inc. v. N.L.R.B.*, 336 F.2d 128, 132 (C.A. 5, 1964); *N.L.R.B. v. Kohler Co.*, 220 F.2d 3, 7 (C.A. 7, 1955). In the instant case, all of the allegations in the complaint, as amended, arise from the same factual situation, are of the same class as and clearly relate to the discrimination against Anderson as set forth in the charge (A. 64). The fact that Kaufman and Caron were not mentioned in the charge is of no consequence. *N.L.R.B. v. Dinion Coil Co., supra; N.L.R.B. v. Puerto Rico Mills, Inc., supra.* All of the issues in question were fully litigated and the Company was afforded full opportunity to present its views. Moreover, after four days of hearing, at the Company's request the Administrative Law Judge adjourned for more than three weeks to give the Company additional time to present its defense. (A. 458, 519, 521). The Company called ten witnesses and introduced 23 exhibits into evidence. It can hardly be said that the Company was prejudiced by the litigation of these issues or that it did not have full opportunity to meet the new allegations. See *N.L.R.B. v. Mackay Radio and Telegraph Co.*, 304 U.S. 333, 349-350 (1938); *N.L.R.B. v. Puerto Rico Rayon Mills, supra.*

II. THE BOARD'S ORDER IS VALID AND PROPER

The Company argued before the Board that the Administrative Law Judge's recommended order was improper on two grounds. First, it asserted that the provision of the Board's cease and desist order, which prohibits it from "in any other manner" interfering with, restraining or coercing its employees in the exercise of their Section 7 rights to, among other things, form, join or assist "any labor organization," was overly broad. However,

the Board reasonably concluded that this provision of the order is appropriate because, as the Administrative Law Judge noted, "the unfair labor practices committed by the Respondent are of a character striking at the root of employees' rights safeguarded by the Act." (A. 45). The record in the instant case reveals a history of Company efforts to discourage union activities among its employees, upon which the Board could reasonably conclude that there exists a danger that other similar acts would be committed in the future. *N.L.R.B. v. Krimm Lumber Co.*, 203 F.2d 194, 196 (C.A. 2, 1953). Its past history considered together with its current misconduct demonstrates an attitude evincing opposition to the purposes of the Act and a willingness to resort to conduct proscribed by the Act when it suits its purpose. In these circumstances, the Board's order is well warranted and the authorities support its enforcement. *N.L.R.B. v. Krimm Lumber Co., supra; Precision Fabricators, Inc. v. N.L.R.B.*, 204 F.2d 567, 569 (C.A. 2, 1953); *Allegheny Pepsi-Cola Bottling Co. v. N.L.R.B.*, 312 F.2d 529, 532 (C.A. 3, 1962); *Central Mercedita, Inc. v. N.L.R.B.*, 288 F.2d 809, 812 (C.A. 1, 1961).

The Company additionally takes issue with the portion of the Board's order which requires it to post notices not only at Douglaston but also at its other New York spas. Such a remedy, however, is fully justified under Section 10(c), for it clearly is not "a patent attempt to achieve ends other than those that can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Corp. v. N.L.R.B.*, 319 U.S. 533, 540 (1943). Accord: *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964); *J.P. Stevens and Co., Inc. v. N.L.R.B.*, 417 F.2d 533, 537, 540 (C.A. 5, 1969). All ten spas covered by the Board's order are in a confined geographical area. The decisions to change the terms and conditions of employees Anderson, Caron, and Kaufman, to reprimand Caron and to discharge Anderson were made by Company President Schwartz, Service Supervisor Gabrielle Schwartz and Anita Katz, assistant service

supervisor, as well as Steve Wolf, floor manager at the Douglaston spa and thus not simply at the local level (A. 14, 16, 34-36; 586-587, 692-693, 725, 794, 805). In view of the Company's central labor policy and its prior unlawful conduct to discourage employee organizational efforts at several Company spas (*Jack La Lanne I*), it is reasonable to require the Company to post notices assuring against similar activities at its other locations. Further, the facts that the discriminatees themselves have worked at more than one spa (*supra*, pp. 12-13), and that the Company has a general policy allowing for plant transfers (A. 693), also support the inference that the Company's conduct would reasonably tend to have a coercive impact at the other plants. Accordingly, the notice posting requirement represents an appropriate exercise of the Board's broad remedial authority. See *J.P. Stevens and Co., Inc. v. N.L.R.B.*, 380 F.2d 292, 304 (C.A. 2, 1967), cert. denied, 389 U.S. 1005; *N.L.R.B. v. Great Atlantic and Pacific Tea Co.*, 408 F.2d 374, 375-376 (C.A. 5, 1969); *Heck's, Inc.*, 159 NLRB 1151, 1157 (1966), enforced, 387 F.2d 65 (C.A. 4, 1967).

CONCLUSION

For the foregoing reasons, we respectfully request that a judgment be entered enforcing the Board's order in full.

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January 1976.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 75-4205
	)	
JACK LA LANNE MANAGEMENT CORP.,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 27th day of January, 1976